MOTION FILED

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Nos. 82-818 & 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.,
Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations respectfully moves the Court for leave to file the accompanying supplemental brief *amicus curiae* in support of the petitioners in this case. The purpose of this motion is to call to the Court's attention very recent developments which demonstrate that the ruling of

the court below is already having serious adverse effects on collective bargaining. These events refute the easy assurances, expressed in respondents' brief and in a brief *amicus* filed in their support, that employers would not utilize the bankruptcy laws to avoid their obligations under collective bargaining agreements as stated in the national labor laws.

This motion and brief will be served by hand or express mail on counsel for all parties.

CONCLUSION

For the above stated reasons, this motion for leave to file a supplemental brief *amicus curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:

Bus Employees v. Missouri, 374 U.S. 74	2
Chemical Workers v. Pittsburgh Glass, 404 U.S. 167	2
Cullen v. Bowles, 148 F.2d 621 (C.A. 2)	3
Dowd Box Co. v. Courtney, 368 U.S. 502	2
In re Continental Air Lines, Inc., et al., (Bankruptcy Ct., S.D. Tex. No. 83-04020-H1-5)	4
Nat. Licorice Co. v. Labor Board, 309 U.S. 350	2
Shore Line v. Transportation Union, 396 U.S. 142	4

STATUTES:

Bankruptcy Code, 11 U.S.C.:	
Chapter 11	3, 6
National Labor Relations Act as amended by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*:	
§ 8(d)	2, 4
§ 301	2
Railway Labor Act, § 6, 45 U.S.C. 156	4

MISCELLANEOUS:

New York Times:	
September 28, 1983	4
October 3, 1983	6
Wall Street Journal:	
September 26, 1983	4
September 27, 1983	6
September 27, 1983	6
September 29, 1983	6

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SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This supplemental brief amicus curiae is filed contingent on the granting of the foregoing motion for leave to file this supplemental brief.

ARGUMENT

1. In our opening brief, we stressed that the National Labor Relations Act and the Labor Management Relations Act establish a dual regime with regard to the ne-

gotiation and renegotiation of collective agreements: Section 301 provides for rules that, like the common law of contracts, are designed "to assure adherence to contract terms." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 167, 187. Those rules, again like the law of contracts generally, are enforceable through the "usual processes of the law." *Dowd Box Co. v. Courtney*, 368 U.S. 502. Section 8(d), in turn, states a *second* set of rules that have a "more specialized purpose than merely promoting general contract compliance"—*viz.*, to "*facilitate agreement in place of economic warfare.*" *Pittsburgh Glass*, 404 U.S. at 187. This second set of rules, like the rest of the regulatory scheme governing the collective bargaining process, is not subject to the "usual processes of the law" but to the system for administering public rights and obligations specially designed by Congress for this purpose. See *Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 364. Section 8(d)'s essence, in short, is to state public law rules concerning the times at which there must be economic peace and the times at which the parties may initiate economic warfare and the forms that must be followed in so doing. The requirement that the *status quo* with regard to mandatory bargaining subjects be maintained during certain periods embodies Congress' conclusion that neither management nor labor should be free to set in motion the process of "collective bargaining with the right to strike at its core" (*Bus Employees v. Missouri*, 374 U.S. 74, 82) during the term of a collective agreement. Congress' rejection of the concept of "continuous collective bargaining" in favor of a concept of industrial stability applies equally as a restraint on unions in good times and on employers in bad times.

We argued, too, that the authority of the bankruptcy court to relieve a debtor-in-possession of the obligations stated in § 8(d) is no different from the authority of the bankruptcy court to relieve debtors-in-possession of the public law obligations generally. It "has been generally held that federal statutes regulating business in the pub-

lic interest are equally applicable when the business is run by trustees or receivers." *Cullen v. Bowles*, 148 F.2d 621, 623 (C.A. 2).

Finally, we pointed out that the maintenance of the public law rules designed to further industrial peace is entirely compatible with the language, legislative history, aims and purposes of the Bankruptcy Code. Where employers miscalculate and, by repudiating a collective agreement, initiate economic warfare with a strong and determined union, the result is not conducive to a successful reorganization; and, as the history of labor relations shows, and as the present events described herein confirm, it is customary for employers to calculate their advantages as best they can and to seize those advantages without regard to the overall interest in furthering the national labor policy formulated by Congress.

2. Respondents' brief attempts to dispute the foregoing by arguing that the prospect of obtaining rejection of a collective bargaining agreement is *not* sufficient, by itself, to encourage employers to abuse Chapter 11 procedures:

> The fears voiced by the Union that the test formulated by the Third Circuit will encourage solvent employers to file Chapter 11 petitions in a bad faith attempt to rid themselves of the obligations imposed by collective bargaining agreements are groundless. It is unlikely that many solvent businesses will subject themselves to the strict creditor scrutiny and court control which Chapter 11 imposes merely in an attempt to escape the terms of labor agreements. [Brief for Respondents, p. 26, n.8.]

Similarly, *amicus curiae* Chamber of Commerce assures the Court that the incentives for negotiation are best protected by the approach adopted by the court below. (Chamber Br. p.14).

Recent developments, discussed below, demonstrate that these assertions are unfortunately not correct. The lower

court holdings allowing rejection have indeed encouraged employers to look to the bankruptcy court as a forum for achieving otherwise unattainable labor goals.

3. On September 24, 1983, Continental Airlines,[1] the eighth largest American commercial air carrier, filed a Chapter 11 petition in the Southern District of Texas. *In re Continental Air Lines, Inc., et al.*, Bankruptcy Court S.D. Tex., No. 83-04020-H1-5. The Company immediately abrogated its collective bargaining agreements covering its several thousand pilots, flight attendants, and machinists. Wage rates were cut from 45 to 50 percent and new emergency work rules were implemented. *New York Times*, September 28, 1983, p. D6.

Continental readily conceded that it was not confronted with a cash or credit crisis and that its sole objective in filing its Chapter 11 petition was to overturn its labor agreements. As Continental's chairman and President Frank Lorenzo put it, "it wasn't a problem of insufficient cash. . . . Our sole problem was labor." *Wall Street Journal*, September 26, 1983, p. 1.

Continental did not obtain a rejection order prior to implementing unilateral changes in its labor agreements. Rather, Continental, in a letter to the pilots' union, plainly drafted by attorneys familiar with and eager to exploit the rule announced in the decision below, wrote:

> As you have been advised, at 6:30 p.m., (C.D.T.) on September 24, 1983, Continental Air Lines, Inc. and

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[1] The labor relations of Continental Airlines are subject to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* This difference is immaterial however, since, like § 8(d) of the NLRA, § 6 of the RLA, one of its status quo provisions, severely restricts employers and unions from making unilateral changes during the life of an agreement:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. [*Shore Line v. Transportation Union*, 396 U.S. 142, 150]

> Texas International Airlines, Inc. ("the Company") filed in the United States Bankruptcy Court for the Southern District of Texas petitions for reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code. As of that time, the Company became a "Debtor-In-Possession" charged with responhibility for prudently administering the assets of the Company pending reorganization.
>
> It is the intention of the Debtor-In-Possession to continue without interruption the operations of at least a portion of Continental's flight schedule. Enclosed for your information are copies of emergency work rules which the Debtor-In-Possession is promulgating and implementing immediately in order to define wages, hours and work rules for all employees in continuing in the active service of the Company as Debtor-In-Possession.
>
> * * * *
>
> The emergency work rules also constitute a proposal for a new Agreement with your organization by the Debtor-In-Possession in accordance with the provisions of Section 6 of the Railway Labor Act. While the Debtor-In-Possession is prepared to negotiate for inclusion in a new Agreement of certain non-economic sections of the Company's prior Agreement(s) with your organization (e.g., seniority system, grievance-arbitration procedure, union security provisions), the Debtor-In-Possession is not prepared to assume that prior Agreement and expressly disclaims any intention to do so.[2]

As these events illustrate, the Court of Appeals ruling in this case removes any incentive for a distressed employer to bargain with a union over reductions in terms and conditions of employment. There is no reason to negotiate with the union when the Company can unilater-

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[2] Letter dated September 24, 1983 from Tom Matthews, Vice President-Employee Relations, Continental Airlines, to Captain Larry Baxter, MEC Chairman, Air Line Pilots Association, International.

ally implement changes after filing its Chapter 11 petition. This is precisely what has occurred at Continental. As the *Wall Street Journal* recently reported, Continental presented its cutback package to the unions on a take it or leave it basis. When the unions declined to accept, the Company filed its petition and implemented the cutbacks unilaterally. *Wall Street Journal*, September 27, 1983, p. 14.

4. The recent conduct of Eastern Airlines further demonstrates that the *Bildisco* precedent is having a significant adverse impact on collective bargaining relationships even where no Chapter 11 petition is filed. On September 27, 1983—three days after the Continental filing—Eastern's chairman Frank Borman demanded that the unions representing most of Eastern's 37,500 employees agree to a 15% pay cut. In a videotaped message to Eastern employees Mr. Borman specifically threatened to file a Chapter 11 petition—in his words "a la Continental"—if the pay cut proposal were refused. *Wall Street Journal*, September 29, 1983, p. 33.

5. Obviously, none of these employer actions are consistent with the public policy of substituting agreement for economic warfare. Indeed, at this writing Continental's pilots, flight attendants, and machinists are engaged in a nationwide strike. *New York Times*, October 3, 1983, p. B13. Unions representing Eastern's employees have vowed to resist the Company's demand for wage reductions. *Wall Street Journal*, September 28, 1983, p. 4. **By sanctioning employer repudiations of collective bargaining agreements, the courts below have undermined national labor policy without advancing national bankruptcy policy.**

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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